VERMONT LABOR RELATIONS BOARD

JAMES HALL	)	
	)	
v.	)	
	)	DOCKET NO. 10-02
MARBLE VALLEY REGIONAL	)	
TRANSIT DISTRICT	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should issue an unfair labor practice complaint in this matter. On January 6, 2010, James Hall filed an unfair labor practice charge alleging that the Marble Valley Regional Transit District ("MVRTD") discriminated against him on the basis of his age, in violation of 21 V.S.A. §1726(a)(7), in not rehiring him this winter as a seasonal bus driver. MVRTD filed a response to the charge on January 25, 2010.

Labor Relations Board Executive Director Timothy Noonan met with the parties on February 23, 2010, to investigate the charge and to attempt informal resolution of it. Hall filed a memorandum in support of his charge on March 1, 2010. The parties have not informally resolved this matter. Thus, the Board needs to decide whether to issue an unfair labor practice complaint against MVRTD.

Factual Background

The following pertinent factual background for the purpose of deciding whether to issue an unfair labor practice complaint is based on written materials provided by Hall and MVRTD and information provided during the February 23, 2010, investigatory meeting.

MVRTD has provided public transportation services for Rutland County for 32 years. It provides bus service seven days a week. It employs full-time year-round, part-

time and seasonal employees. It employs seasonal employees during skiing season to accommodate trips to and from Killington/Pico and Okemo ski resorts.

> The MVRTD Employee Handbook provides in pertinent part:
> . . .
> EQUAL EMPLOYMENT OPPORTUNITY
> MVRTD maintains a strong policy of equal employment opportunity for all employees and applicants for employment. We hire, train, promote and compensate employees on the basis of personal competence and potential for advancement without regard for race, color, religion, gender, sexual orientation, national origin, age . . .
> . . .
> COMPANY POLICIES
> . . .
> Employment at Will
> As stated throughout this handbook, MVRTD reserves the right to terminate an employee at any time. Neither completion of applications or hire paperwork nor receipt of this handbook implies a contractual agreement of employment between an employee and MVRTD. . .

James Hall is 69 years old. He was employed as a seasonal bus driver by MVRTD for 13 consecutive years through the 2008-2009 winter season. He worked between November and April. For the first 11 years of employment, Hall also was a full-time bus driver for Rutland Public Schools. During this period, he worked weekends for MVRTD. He retired from his full-time position in June of 2007. At the time of his retirement from his full-time position, Hall told MVRTD that he was willing to work three days a week.

During the 2007-2008 and 2008-2009 seasons, Hall generally worked three days a week – Monday, Thursday and Saturday – driving the Rutland-Killington Connector. He always worked days. He worked extra shifts when asked. He was unable to work on Tuesdays due to his responsibilities as a Selectboard member in Rutland Town. Usually, Hall worked the Rutland-Killington Connector loop. There were occasions when he was asked to work other routes. Hall agreed to work those routes. During the 2008-2009 winter season, he worked ten different routes.

During his employment with MVRTD, Hall did not receive any notice of performance deficiencies. MVRTD did not reprimand or otherwise discipline him. At the end of the 2008-2009 winter season, MVRTD Operations Manager Ken Putnam provided him with a letter stating: "I want to thank you for everything you have done for MVRTD throughout the season – coming in on your day off, working extra hours during the week and peak holiday periods, etc."

In the winter seasons preceding 2009-2010, MVRTD operated a free shuttle service between Rutland and the Killington Resort. This was the route that Hall usually worked during the 2007-2008 and 2008-2009 winter seasons. The shuttle service was placed in jeopardy for the 2009-2010 winter season when the Killington Resort announced that it would no longer fund the shuttle service. MVRTD, area businesses and the Town of Killington ultimately reached agreement on November 25, 2009 to operate a shuttle service but the days covered were substantially reduced. Instead of operating seven days a week, the shuttle was scheduled to run only on Saturdays and holidays. As a result, MVRTD's need for seasonal drivers was reduced.

On August 23, 2009, Hall sent Putnam an e-mail message providing:

> "A while back, I left a note on your desk indicating that I am interested in working again this coming season. . . I just wonder if I am included in the plans for the coming season. If not, I would like a yes/no so I can make other plans for the winter if need be. . . It may be that you just don't know now, if that is the case, I can wait a few days. School will be starting soon, and I will likely use that as a fallback if I need to."

Putnam responded by e-mail on August 25:

> "Jim, thank you for letting me know your interest in driving this upcoming season. . . . we are working with Killington planners on the season schedule. At this point we are not sure to what extent the changes will be, but we know that there is going to be some reduction of service. Because of this, we cannot commit

> to what our schedule will look like. Certainly, if you have a guaranteed job opportunity I would encourage you to pursue that."

Hall inquired about driving a school bus with area schools. There were no jobs available. He did not communicate this to MVRTD. In early October, Hall again contacted MVRTD inquiring whether seasonal drivers would be needed and whether he was in the plans for work during the winter season. He was informed that the season schedule had not been finalized and the level of staffing was not yet known. In early November, attorney Judy Barone contacted MVRTD on behalf of Hall and inquired whether Hall would be rehired. Putnam informed her that the hiring of Hall for the winter season was still uncertain.

On November 6, 2009, Hall wrote a letter to MVRTD seeking an answer concerning whether he would be employed. Ellen Coyle, MVRTD Human Resource Coordinator, sent a letter to Hall dated December 2, 2009, which provided:

> Thank you for your interest in Marble Valley Regional Transit District as a potential place of employment. As we discussed with you earlier this year, we have been working to finalize our winter driving needs for several months. At this time, we are not in need of any further seasonal driving staff. We wish you the best as you continue your job search.

MVRTD employed eight seasonal drivers during the 2009-2010 winter season. It had employed 12 seasonal drivers the previous winter season. The ages of the eight seasonal drivers hired for 2009-2010 were: 25, 39, 53, 56, 57, 62, 68 and 81. Their average age was 55. Although MVRTD classified the 81 year old driver as a seasonal employee, he actually was employed during the whole year. He worked nearly full-time during the winter season and limited hours the rest of the year.

The eight seasonal drivers were not all hired at the same time; they were hired in waves. They were employed as some routes began to experience increased volume. One

of the seasonal drivers worked only on nights on a part-time basis. All of the other seasonal drivers were scheduled to work nights, days and weekends. All the seasonal drivers except the driver who worked part-time on nights were scheduled to drive various routes and drove "para-transit". Para-transit involves transporting the elderly and others with medical needs. Drivers have to be certified to perform para-transit duties. Four of the eight seasonal drivers had not worked for MVRTD in past years.

No one at MVRTD told Hall why he was not hired for the 2009-2010 winter season. MVRTD representatives indicated during the investigation of this matter that Hall did not fit MVRTD's needs that season and was not employed because he did not work nights, only worked three days a week, and was not able to do para-transit.

No one at MVRTD asked Hall whether he was willing to work more than three days a week or work nights. Hall may have been willing to work more than three days a week. Hall had never driven para-transit. He was not certified to perform such duties. No one at MVRTD spoke with Hall about becoming certified to perform para-transit duties. Para-transit certification involved two weekends of training. Hall may have considered doing such training if asked by MVRTD.

Discussion

The Board has jurisdiction over public transportation agencies such as MVRTD under the Municipal Employees Relations Act. Hall contends that MVRTD violated Section 1726(a)(7) of the Municipal Act by discriminating against him based on his age when he was not hired as a seasonal driver for the 2009-2010 winter season. "Seasonal" employees are considered employees within the meaning of the Municipal Act.[1]

[1] IBEW Local 300 and Town of Roxbury, 30 VLRB 125, 131-132 (2009).

The Board has discretion whether to issue an unfair labor practice complaint and hold a hearing on an unfair labor practice charge.[2] In exercising this discretion, the Board will not issue a complaint unless the charging party sets forth sufficient factual allegations for the Board to conclude that the charged party may have committed an unfair labor practice.[3] In determining whether to issue an unfair labor practice complaint, we view the pertinent factual background in the light most favorable to Hall.[4]

In determining whether an employee was discriminated against on account of the prohibited factor of age, the Board applies the analysis developed by the U.S. Supreme Court, which has set forth the basic allocations of burden and order of presentation in disparate treatment cases.[5] The Court has made it clear that the burden of proof remains at all times with the complainant.[6] The central focus of inquiry in a disparate treatment case is always whether the employer is treating some people less favorably than others because of their age.[7] To establish a disparate treatment claim, "it is the (complainant's) task to demonstrate that similarly situated employees were not treated equally."[8] The Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination.[9] We will apply the analyses set forth by the Court in both

[2] 21 V.S.A. §1727(a).
[3] Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).
[4] Nelson v. Superintendent, Northern State Correctional Facility, Vermont Department of Corrections, 27 VLRB 240, 246 (2004).
[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[6] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
[7] Grievances of Choudhary, 15 VLRB 118 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994). Grievance of Day, 14 VLRB 229, 286 (1991). Gamez v. Brandon Training School, 12 VLRB 160 (1989).
[8] Grievance of Butler, 166 Vt. 423, 431 (1997); *citing* Burdine, 450 U.S. at 258.
[9] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

types of cases in determining whether to issue an unfair labor practice complaint in this matter.

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination.[10] The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.[11] First, the complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination.[12] If the complainant succeeds in proving the *prima facie* case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action.[13] Finally, if the employer carries this burden, the complainant must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.[14]

We will issue an unfair labor practice complaint only if Hall establishes a *prima facie* case of age discrimination. The burden of establishing a *prima facie* case of discrimination is not onerous.[15] It is sufficient that the adverse action occurred in circumstances that give rise to an inference of discrimination.[16] Comparative evidence – evidence that an employer treated an older employee less favorably than similarly-situated younger employees – raises an inference of discrimination sufficient to demonstrate a *prima facie* case of age discrimination.[17]

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[10] Id. Day, 14 VLRB at 286.
[11] Id.
[12] Id.
[13] Burdine, 450 U.S. at 253. Day, 14 VLRB at 287.
[14] Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Day, 14 VLRB at 287.
[15] Burdine, 450 U.S. at 253. Day, 14 VLRB at 288.
[16] Id.
[17] Day, 14 VLRB at 289.

In applying that analysis to this case, we conclude that Hall has not established a *prima facie* case of age discrimination. In viewing the factual background in the light most favorable to Hall, he has not demonstrated that the failure to rehire him for the 2009-2010 winter season occurred in circumstances that give rise to an inference of discrimination.

There was a substantial reduction in the number of seasonal drivers needed for the 2009-2010 winter season. Due to a curtailed shuttle service between Rutland and the Killington Resort, the number of seasonal drivers dropped from twelve to eight. Hall has not demonstrated that the fact he was one of the drivers not rehired gives rises to an inference of age discrimination against him.

The comparative evidence of the ages of seasonal drivers who were hired for the 2009-2010 winter season does not raise an inference that the 69 year old Hall was treated less favorably due to his age. Two of the hired drivers were in their 60's and another one was 81. Also, Hall has presented no other direct or circumstantial evidence indicating that his age may have been a factor in not rehiring him.

We recognize that Hall was a long-term employee of 13 years with a good work record. Nonetheless, these circumstances standing alone do not give rise to an inference of age discrimination. After the investigatory meeting in this matter, Hall himself did not point to age discrimination as the reason why he was not asked to return to work. In the memorandum he filed with the Board on March 1, 2010 in support of his charge, he stated: "If it is because I write a few letters to the editor that MVRTD doesn't agree with, my political standing in the community, or my connections in the circles in which I travel due to my Selectboard duties in Rutland Town; these or any other thought is pure

conjecture on my part; but I do believe it is something along these lines." Noticeably absent from these possible reasons for his not being rehired is discrimination against him based on his age.

We next apply the analysis in "mixed motive" cases to determine whether to issue an unfair labor practice complaint. In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives.[18] Once an employee shows that a prohibited factor played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role.[19] Direct evidence or circumstantial evidence may be used to show that one of the employer's motives was improper in "mixed motive" cases.[20] Direct evidence is evidence that, if believed, proves the existence of the fact in issue without inference or presumption.[21]

Hall has not presented direct or circumstantial evidence showing that age discrimination against him played a substantial or motivating factor in the decision not to rehire him. The comparative evidence discussed above concerning the ages of the seasonal drivers hired during the winter season does not indicate Hall's age played any part in the decision. Further, as discussed above, Hall has presented no other direct or circumstantial evidence indicating that his age may have been a factor in not rehiring him.

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[18] Price Waterhouse, 490 U.S. at 244- 249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261,294 - 295 (1995)
[19] VSCFF (Re: Yu Chuen Wei, 18 VLRB at 294-95.
[20] Id.
[21] VSCFF (Re: Yu Chuen Wei), 18 VLRB at 295.

MVRTD representatives indicated during the investigation of this matter that Hall did not meet MVRTD's needs for this winter season because he did not work nights, only worked three days a week, and was not able to do para-transit. Although Hall accurately points out that MVRTD provided him no opportunity to discuss these issues when they opted not to rehire him, Hall's employment at will status did not require MVRTD to provide him with any reasons why he was not being rehired. MVRTD's lack of communication in this respect does not contribute to a determination that age discrimination against Hall was a motivating factor in not employing him.

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint. It is ordered that the unfair labor practice charge filed by James Hall in this matter is dismissed.

Dated this 3rd day of June, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park
Richard W. Park

/s/ Leonard J. Berliner
Leonard J. Berliner

/s/ James C. Kiehle
James C. Kiehle